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AFDC for the Unborn

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Comment

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I. INTRODUCTION

Within the past year, the scope of the federal statute[1] authorizing the Aid to Families with Dependent Children ("AFDC") program has been expanded, not by legislative amendment, but by judicial interpretation in a series of federal decisions holding that states cannot deny AFDC assistance to unborn children.[2] Four courts of appeals and ten federal district courts have so held,[3] and two other district courts have issued preliminary injunctions to prevent state welfare departments from denying aid to the unborn.[4] There is, however, a division of authority concerning this issue, since four federal district courts have held that states, at their option, may refuse to grant AFDC payments for the unborn.[5]

The principal issue in these cases is one of statutory interpretation—whether the Social Security Act requires aid for unborn children.[6] Part II of this Comment will deal with how several courts have resolved this problem against the background of previous United States Supreme Court decisions which have construed the

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1. 42 U.S.C. § 601 *et seq.* (1970).
2. Carver v. Hooker, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973); Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823 (E.D. Va. 1973); Wisdom v. Norton, 372 F. Supp. 1190 (D. Conn. 1974); Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973); Harris v. Mississippi State Dep't of Pub. Welfare, 363 F. Supp. 1293 (N.D. Miss. 1973); Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973).
3. *Id.*
4. Tapia v. Vowell, Civ. No. 73-B-169 (S.D. Tex. Nov. 14, 1973); Tillman v. Endsley, No. 73-1476-Civ.-CF (S.D. Fla. Oct. 1, 1973).
5. Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973); Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974); Mixon v. Keller, 372 F. Supp. 51 (M.D. Fla. 1974); Murrow v. Clifford, Civ. No. 114-73 (D.N.J. June 12, 1973).
6. The issue is centered around the interpretation of the words "dependent child" as used throughout the statute, especially in 42 U.S.C. § 606 (a) (1964). No specific reference to the unborn is ever made in the law.

federal AFDC statute.[7] In Part III, the administrative and philosophical ramifications of these decisions will be discussed. Administrative questions like the following must be answered: How are the states to finance the increased AFDC payments, if they are required? Is the unborn child to receive the same payment as a "born" child? What happens in the case of multiple births? What is the significance of a terminated pregnancy? The philosophical difficulties in this area arise primarily out of the last question. As a result of the landmark decision in *Roe v. Wade*,[8] American women presently possess greater legal freedom over the control of pregnancy termination than they have ever known. Despite judicial verbiage to the contrary, the decision to require AFDC for the unborn may be the first step toward curtailing that freedom.[9] Finally, Part IV will attempt to identify the probable trend in this area and to delineate a possible solution to the conflict through a balancing of the welfare recipient's need for AFDC for an unborn child against the need of all women for constitutionally sanctioned control over the termination of unwanted pregnancies.

II. THE CASES

A. Mandatory AFDC for the Unborn

Ten courts of appeals and four federal district courts have held that states cannot deny AFDC benefits to the unborn.[10] The factual background in all the cases was virtually identical. The plaintiffs were pregnant women who were in all ways eligible for AFDC except that their children had not yet been born. Since the state in each instance had no program providing aid for the unborn,[11] the plaintiffs had been denied AFDC benefits until the birth

7. New York Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973); Carleson v. Remillard, 406 U.S. 598 (1972); Jefferson v. Hackney, 406 U.S. 535 (1972); Townsend v. Swank, 404 U.S. 282 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); King v. Smith, 392 U.S. 309 (1968).
8. 410 U.S. 113 (1973).
9. In Alcala v. Burns, 362 F. Supp. 180 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974), the court noted that "the fact that a child is not protected as a person under the United States constitution is not relevant to the . . . [present] inquiry." *Id.* at 186. The court's reasoning fails to resolve the fundamental conflict, as will be shown subsequently.
10. *See* note 2 *supra*.
11. The New Hampshire welfare program, as noted in Carver v. Hooker, 369 F. Supp. 204 (D.N.H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), differs slightly from the others discussed in this Comment. New Hampshire, though denying AFDC benefits to pregnant women who have no other children, will pay for the prenatal care of an otherwise eligible pregnant woman if the woman already has a "born" child

of their children. Each of the cases was brought as a class action[12] representing (1) all women whose pregnancies had been medically determined and who met the eligibility requirements for AFDC but were denied benefits until their children were born and (2) their unborn children.[13] The plaintiffs sought injunctions restraining

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or children receiving AFDC benefits. *See* Carver v. Hooker, *id.*, at 209. This difference is not particularly significant for the purposes of this Comment, and the *Carver* case will be discussed without further reference to the unusual and seemingly inexplicable distinction made by the New Hampshire Public Welfare Department between those pregnant women without other children and those with other children.

12. The plaintiffs in Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), were given leave to proceed as a class, and since this was the first of these cases to be decided, the other courts, in general, followed the *Wilson* court's reasoning. In *Wilson* it was noted that a class action was necessary to enable the class members to secure the full relief to which they were entitled. Plaintiffs were seeking payment of all AFDC benefits wrongfully denied and withheld as a result of the state policy toward the unborn. The court held, *inter alia*, that the class members were entitled to restitution of benefits unlawfully withheld. *Id.* at 1152. This reasoning, however, is no longer valid in light of the United States Supreme Court's holding in Edelman v. Jordan, 94 S. Ct. 1347 (1974), that the eleventh amendment barred the federal courts from awarding welfare benefits retroactively. *See* note 14 *infra*. This leaves open the question of whether plaintiffs could now proceed as a class on some other rationale, and limits, as a practical matter, the usefulness of class actions in this situation.

13. *See* Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974). The fact that in some instances the plaintiffs' children were born before the cases were decided was not a bar to the actions. The court in Carver v. Hooker, 369 F. Supp. 204 (D.N.H. 1973) *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), considered the argument that the birth of plaintiffs' children rendered the action moot and disposed of it in a brief footnote. *Id.* at 218 n.50. Doe v. Lukhard, 363 F. Supp. 823 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974), also held that the plaintiff's claims would not be mooted by the birth of her child. Both courts supported their conclusions by using the Supreme Court's reasoning in Roe v. Wade, 410 U.S. 113 (1973), that the short gestation period of pregnancy should not unjustly prevent prosecution of a claim otherwise capable of repetition. Because of the time presently required to prosecute a claim in a federal district court, this seems to be the only logical solution to the problem. Otherwise, as the court appropriately observed in Green v. Stanton, 364 F. Supp. 123, 127 (N.D. Ind. 1973), *aff'd sub nom.*, Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), the plaintiffs would "receive nothing as a result of this decision." Additionally, the *Lukhard* court used the plaintiff's claim for past benefits to support its holding that the case was not moot. Doe v. Lukhard, *supra* at 826. This argument is no longer valid because of the Supreme Court's holding in Edelman v. Jordan, 94 S. Ct. 1347 (1974), that the eleventh amendment barred federal courts from awarding welfare benefits retroactively. *See* note 14 *infra*. This, however, would not require that

the states from further denying AFDC benefits for their unborn children, and declaratory judgments determining the states' practice to be illegal.[14]

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a court hold plaintiffs' claims moot after the birth of their children as the short gestation period rationale of *Wade* remains viable.

Mootness was also raised as an issue in Jones v. Graham, Civ. No. 73-L-235 (D. Neb. April 5, 1974). After the suit was filed, the Nebraska Department of Public Welfare promulgated new regulations providing the same benefits for unborn as for born children. The court concluded that the Department's assurance that the regulations were permanent was reliable. Because Edelman v. Jordan *supra*, precluded an award of retroactive payments accruing prior to the new regulations, the court held the issues presented in the plaintiffs' complaint moot and dismissed the case. It is not known what assurances the Department of Public Welfare provided the court to convince it of the permanency of the new regulations. One can only speculate on the court's reaction should the Department rescind these regulations in the future.

14. In addition to declaratory and injunctive relief, the plaintiffs in a significant number of these cases also sought the payment of benefits which they alleged had been wrongfully withheld by the states. Carver v. Hooker, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) and Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973); Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973). Subsequently the United States Supreme Court in Edelman v. Jordan, 94 S. Ct. 1347 (1974), held that the eleventh amendment barred federal courts from ordering payments or awarding welfare benefits retroactively. For a discussion of the impact of this holding on the issue of mootness and the use of class actions, see notes 12 and 13 *supra*. The Court found that Illinois officials administering the programs of Aid to the Aged, Blind and Disabled ("AABD"), which like the AFDC programs are funded by the state and federal governments, had violated federal law by following state regulations that did not comply with federal standards. The Supreme Court held, however, that the judgment could be given a prospective effect only because ordering retroactive payments would amount to an award of damages against the state and was therefore barred by the eleventh amendment. The Court noted that although the amendment, by its terms, did not bar suits against a state by one of its own citizens, that it had consistently held an unconsenting state immune from suits brought against it in federal courts by its own citizens as well as by citizens of another state.

Even before Edelman v. Jordan, *supra*, most of the AFDC cases considering this issue had reached similar results. The court in Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973), used an eleventh amendment rationale like that in *Edelman* to deny an award of retroactive benefits. Other courts reasoned that the basic policy underlying the Social Security Act in this situation was remedial, and that its goal of affording prenatal care to the disadvantaged would not be furthered by a retroactive award of compensatory

1. Need for AFDC

The plaintiffs in the unborn children cases based a portion of their claims on their need for AFDC payments, both for themselves and their unborn children. The courts were responsive. One court commented upon "the serious consequences that flow to the family if the nutritional and medical needs of the child are not met during this prenatal period,"[15] while another noted the "serious and lasting" consequences which may result from inadequate care and nutrition during the prenatal period.[16] The courts in both *Stuart v. Canary*[17] and *Carver v. Hooker*[18] discussed at some length the adverse effects of improper prenatal diet and medical care, noting especially the lower birthweight of infants born under these conditions. The *Carver* court found:

> [P]renatal nutrition, and to a lesser extent, prenatal medical care, is a major determinant of infant birthweight, which is in turn directly related to later susceptibility to disease, neurological problems and long-term learning capacity. Dr. Jacobsen [expert witness in the field of maternal and infant nutrition] further testified that, absent AFDC benefits, it was "highly unlikely" that a mother could be assured of an adequate nutritional intake based on the State food allowances available to pregnant women.[19]

The *Stuart* court concluded, from evidence similar to that discussed in the *Carver* case, that

> [i]f adequate fetal nutrition can alleviate in any degree potential

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damages, particularly where the state had not acted in bad faith in denying AFDC. Carver v. Hooker, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973).

Two district courts did order the retroactive payment of AFDC benefits. Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973) (benefits awarded retroactively to all class members as well as to named plaintiffs); Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973) (benefits awarded retroactively only to named plaintiffs). The portion of both these cases granting retroactive benefits was subsequently reversed, Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) and Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973), following the Supreme Court's decision in Edelman v. Jordan, *supra*.

15. Alcala v. Burns, 362 F. Supp. 180, 184 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).
16. Green v. Stanton, 364 F. Supp. 123, 126 (N.D. Ind. 1973), *aff'd sub nom.*, Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), *citing* Birch, *Functional Effects of Fetal Malnutrition*, HOSP. PRAC. 134 (1971).
17. 367 F. Supp. 1343 (N.D. Ohio 1973).
18. 369 F. Supp. 204 (D.N.H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974).
19. *Id.* at 208.

> burdens upon the State toward the goal of familial betterment, inclusion of the unborn as eligible for AFDC coverage is indicated by the intent of Congress in implementing the Social Security Act.[20]

Thus, these courts reasoned, AFDC for the unborn child is consistent with the purposes of the Social Security Act as set out in section 601 of Title 42 of the United States Code:

> For the purposes of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

As expressed by the United States Court of Appeals for the Seventh Circuit,[21] the paramount goal of AFDC is the protection of needy children and "[t]he providing of benefits to unborn needy children fully implements that goal.[22]

This rationale posits a need for sufficient and proper food and complete medical care during the prenatal period and is reinforced by the consequences of infant and maternal deaths, permanent neurological disorders and mental retardation which can result from inadequate care and nutrition prior to the birth of the child. While it can, of course, be argued that prevention of such difficulties is within the contemplated purposes of section 601, it seems abundantly clear that this sort of reasoning anticipates benefits to both the mother and the unborn child. The child is, without question, regarded as a "person" in those instances and this may cause, in part, the conflicts with the decision in *Roe v. Wade*.[23] This aspect of the problem will be discussed more fully in Part III.

2. *Statutory Interpretation*

The ultimate inquiry in this area is whether the Social Security Act requires aid for the unborn. The AFDC program is jointly financed by the states and the federal government and administered by the individual states or by political subdivisions within the state under state supervision. Each state has the option of participating

20. Stuart v. Canary, 367 F. Supp. 1343, 1346 (N.D. Ohio 1973).
21. Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).
22. *Id.*
23. 410 U.S. 113 (1973).

in the program. Those states choosing to participate submit a plan of administration to the Secretary of Health, Education, and Welfare. If the plan meets the requirements of the Social Security Act, it is approved, and the federal government provides matching grants-in-aid to the state within the limits of the Act's provisions specifying the scope of federal financial participation.

The requirements for obtaining federal approval of a state AFDC plan are contained in section 602 of Title 42 of the United States Code (hereinafter "section 602"). Sections 606, 607 and 608 define the class of persons in whose behalf the state may receive federal matching funds under the AFDC program. Section 602 (b) provides that the Secretary "shall approve" any plan which fulfills the conditions specified in section 602 (a). One of those conditions is that AFDC "shall be furnished with reasonable promptness to all eligible individuals."[24] Under this requirement, a state plan may not contain an "eligibility standard that excludes persons eligible for assistance under federal AFDC standards."[25]

The supremacy clause of the Constitution requires that any conflict between state law or policy and federal law must be resolved in favor of the federal law. Whether the unborn constitute "eligible individuals" who thus may not be excluded from the AFDC program under Section 602 (a) (10) of the Social Security Act the issue which must be resolved.

The interpretation of the words "dependent child" in section 606(a) of Title 42 of the United States Code[26] (hereinafter "section 606(a)") is central to the resolution of that issue. Although it does not appear on the face of the statute that this phrase would, neces-

24. 42 U.S.C. § 602(a)(10) (1964).

25. Townsend v. Swank, 404 U.S. 282, 286 (1971). This discussion of the general nature of the AFDC program is taken from the Brief for the United States as Amicus Curiae, Carleson v. Remillard, 406 U.S. 598 (1972).

26. When used in this part—

> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a vocational or technical training designed to fit him for gainful employment;

42 U.S.C. § 606(a) (1970).

sarily, include the unborn, many courts have reached that result. This interpretation is based on several sources: dictionary definitions, legislative history, and guidelines previously enunciated by the Supreme Court for determining eligibility for AFDC.[27]

First, it is noted that as a general rule words used in a statute are to be given their usual and commonly understood meaning. The courts have recited the dictionary definition of "child" which is "an unborn or recently born human being."[28] From this, one of the courts concluded directly that this was the meaning intended by Congress to be given to the word "child" in section 606(a);[29] another determined that at least there is no evidence of congressional intent to exclude the unborn;[30] while a third, more realistically, observed that "the 'plain language' of the statute is not as plain as both parties contend and is surely not conclusive for the plaintiffs or the defendants."[31]

Having determined that the language of the Social Security Act was inconclusive, some courts looked to the Act's legislative history in an attempt to find a clearer manifestation of congressional intent. Those which explored this question in depth[32] reached identical conclusions: although legislative history contemporaneous with the original Social Security Act is inconclusive, the last Congress recognized the prevailing interpretation of section 606(a) as including the unborn. Both houses of the Ninety-Second Congress proposed amendments which would have prohibited AFDC payments on behalf of the unborn.[33] These amendments, however, were not

27. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).
28. WEBSTER'S NEW INT'L DICTIONARY 388 (3d ed. 1969).
29. Harris v. Mississippi State Dep't of Pub. Welfare, 363 F. Supp. 1293 (N.D. Miss. 1973).
30. Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973), *aff'd sub nom.*, Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974). *See also* Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).
31. Alcala v. Burns, 362 F. Supp. 180, 184 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).
32. Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974); Doe v. Lukhard, 363 F. Supp. 823 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974).
33. The House Ways and Means Committee in H.R. REP. No. 231, 92d Cong., 1st Sess. at 184 (1971), states:

> "Your committee wants to make clear that an unborn child would not be included in the definition of a child. This will preclude the practice, now used in the AFDC program in some states, of finding that an unborn child does meet the definition, thereby establishing a "family" even before the child is born."

And, the Senate Finance Committee Report, S. REP. No. 1230, 92d Cong.,

passed.[34] From this recognition by Congress of the present policy of the federal Department of Health, Education and Welfare (hereinafter "HEW") permitting AFDC payments for the unborn where the states so desire,[35] and from congressional refusal to pass an amendment prohibiting this practice, the courts concluded that Congress had determined unborn children to be "presently entitled to AFDC benefits."[36]

Since 1941, HEW has allowed the states to include the unborn among those receiving AFDC benefits, but has not required their inclusion. The HEW regulation which permits this states only that "[f]ederal financial participation is available in: . . . (ii) payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis."[37] That these benefits are optional is not clearly evident from the regulation, but they have been so interpreted by HEW and by the courts, and HEW has consistently approved state programs with and without provisions for payments to the unborn.[38]

The United States Court of Appeals for the Seventh Circuit placed great weight on HEW's long-standing administrative interpretation that an unborn child constitutes a "dependent child" within the contemplation of the Social Security Act.[39] The court noted that the action of the Ninety-Second Congress was an attempt to exclude the unborn from the coverage of the Act which failed, leaving intact HEW's interpretation that the unborn are to be included in the AFDC program. This court, however, did not discuss the fact that under HEW's regulations the inclusion of the unborn

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2d Sess. at 108 (1972), states: "Regulations of the Department of Health, Education, and Welfare permit Aid to Families with Dependent Children payments for a child who has not yet been born. The committee bill would make unborn children ineligible for AFDC."

34. Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1329.
35. 45 C.F.R. § 233.90(c)(2)(ii) (1973).
36. Wilson v. Weaver, 358 F. Supp. 1147, 1155 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).
37. 45 C.F.R. § 233.90(c)(2) (1973).
38. The policy allowing payments to the unborn originated in Wisconsin which paid these benefits under its 1931 state program which had been in effect prior to the enactment of the federal program. Wisconsin was permitted to include the unborn under its implementation of the federal AFDC program by a ruling of the federal Social Security Board in 1941. Since 1946, assistance for the unborn has been allowed as announced in HEW's Handbook of Public Assistance Administration, and in 1971 the practice of including the unborn in the AFDC program was expressed in HEW's formal regulations for the first time. It has been noted that of the 7,000,000 children receiving AFDC in January, 1971, 53,400 were unborn. S. REP. No. 1230, 92d Cong., 2d Sess. 467 (1972).
39. Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).

has never been required, but is optional with each state. Thus, an equally viable interpretation of the congressional action appears to be that Congress is satisfied with the optional program promulgated by HEW, and will continue to permit, but not require, AFDC for the unborn. None of the courts involved, however, rested their decision entirely on this reasoning.

Instead, the courts have turned to prior judicial interpretations of this portion of the Social Security Act. From a trilogy of cases, *King v. Smith*,[40] *Townsend v. Swank*,[41] and *Carleson v. Remillard*,[42] three principles have been enunciated (as set out in *Alcala v. Burns*[43]):

> (1) The states may not impose more restrictive eligibility conditions for receiving AFDC than those set out in the Social Security Act;
>
> (2) In order to exclude an applicant who would have been covered under the Social Security Act, the state must rely on legislative history or statutory language "clearly evidencing" Congressional intent to allow the exclusion of the applicant;
>
> (3) HEW regulations purporting to make eligibility for certain groups of applicants optional with the states are of no effect in the absence of Congressional intent to allow such exclusions.

Stated otherwise, where they are inconsistent, it is the words of the Social Security Act and not HEW's regulations which are controlling, and absent a clear congressional intent to exclude the unborn from AFDC eligibility, the states may not vary the Act's eligibility requirements without violating the supremacy clause of the Constitution. A brief discussion of the trilogy of cases which led to this holding is appropriate.

In *King v. Smith*,[44] Alabama's "substitute father" regulation[45] was held inconsistent with the definition of "parent" under section 606(a), because neither the Social Security Act nor its legislative history justified the denial of AFDC benefits to the children of a mother who cohabits with an able-bodied man. The Supreme Court

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40. 392 U.S. 309 (1968).
41. 404 U.S. 282 (1971).
42. 406 U.S. 598 (1972).
43. 362 F. Supp. 180, 183 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).
44. 392 U.S. 309 (1968).
45. This regulation of the Alabama Department of Pensions and Security denied AFDC payments to the children of a mother who "cohabited" in or outside her home with any single or married able-bodied man, reasoning that this person constituted a "substitute father" for purposes of the Social Security Act.

in *King*, interpreting sections 606(a) and 602(a),[46] held that the Social Security Act determined eligibility standards for AFDC and that state provisions which narrowed those standards were to that extent invalid under the supremacy clause.

In *Townsend v. Swank*,[47] the Supreme Court held that the states did not have the option of denying AFDC benefits to needy dependent children between the ages of 18 and 21 who attended a college or university while granting these benefits to those who attended high school or a vocational training school. Interpreting *King*, the Court stated:

> Thus *King v. Smith* established that, at least in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that HEW regulations seem to imply that states may to some extent vary eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of Section 402(a) (10) that aid be furnished to *all eligible individuals*.[48]

A recent application of the *King-Townsend* test was in *Carleson v. Remillard*,[49] where the Supreme Court invalidated a California regulation which denied AFDC benefits to otherwise eligible individuals on the basis that absence from the home for military service did not constitute "continued absence from the home"[50] for the purposes of satisfying AFDC eligibility requirements. In that case, as in *King, Townsend* and the unborn child cases, it was contended that because state plans were optional, HEW had the authority to approve plans denying benefits to the children involved. However, since neither the statute nor its legislative history clearly supported that assertion, such coverage was held to be mandatory.[51]

Thus, relying on the authority of these three cases, the courts which considered the unborn child exclusion concluded that neither the Social Security Act nor its legislative history clearly evidenced a

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46. The relevant language of this section provides: "A State plan . . . must . . . (10) provide . . . that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."
47. 404 U.S. 282 (1971).
48. 404 U.S. 282, 286 (1971) (emphasis in original).
49. 406 U.S. 598 (1972).
50. 42 U.S.C. § 606(a) (1970).
51. *See* Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).

congressional authorization for excluding unborn children from eligibility for AFDC under the definition of "dependent child." One court emphatically observed that "the Social Security Act and its legislative history are barren of any clear congressional authorization to exclude unborn children from participating in the AFDC program."[52] Unborn children were therefore held to be eligible for AFDC benefits under section 606(a) and "the state cannot at its option choose to disregard same."[53] The Court of Appeals for the Eighth Circuit in *Alcala v. Burns*[54] accurately and succinctly summarized this line of reason, noting:

> We believe that the district court correctly concluded that the term "dependent child" is broad enough to emcompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act. The *King, Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual, denying benefits to unborn children and their mothers, violates the Supremacy Clause and is invalid.[55]

B. Optional AFDC for the Unborn

Four courts have reached results contrary to those discussed above.[56] These courts, while recognizing that AFDC payments to the unborn are not inconsistent with the purposes of the federal act,[57] have nonetheless held that section 606(a) does not require states participating in the AFDC program to make such payments.

The court in *Parks v. Harden*[58] was the first to hold the payment of these benefits optional. Although it agreed that eligibility for AFDC must be measured by federal and not state standards, the court found it anomalous to rely, as other courts had done, on HEW's interpretation of eligibility but to reject HEW's recognition of the optional nature of the program.[59]

As previously noted, however, "The *Parks* opinion did not ex-

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52. Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).
53. Doe v. Lukhard, 363 F. Supp. 823, 828 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974).
54. 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973).
55. *Id.* at 746.
56. Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973); Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974); Mixon v. Keller, 372 F. Supp. 51 (M.D. Fla. 1974); Murrow v. Clifford, Civ. No. 114-73 (D.N.J. June 12, 1974).
57. "There can be no question that, in terms of need and dependency, many unborn children are in far more severe circumstances than born children," Parks v. Harden, 354 F. Supp. 620, 622 (N.D. Ga. 1973).
58. 354 F. Supp. 620 (N.D. Ga. 1973).
59. *See also* Doe v. Lukhard, 363 F. Supp. 823, 828 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974). *See* text accompanying notes 35-39 *supra*.

plain from where the authority for a so-called optional program was derived if such coverage was not contemplated by the Social Security Act."[60] And, if coverage was contemplated within the Act, it would appear that the states could not vary the coverage under the rule of *King, Townsend,* and *Carleson* cases. The *Parks* court, however, concluded that "mere inclusion in the regulations does not in itself require the payment of benefits. That states still have latitude in their choice of programs is evident."[61] *Dandridge v. Williams*[62] and *Jefferson v. Hackney,*[63] were cited as authority for this proposition.

In the *Dandridge* case, the Supreme Court held that a Maryland maximum grant regulation placing an absolute limit on the amount of an AFDC grant regardless of the size of a family and its actual need, was not in conflict with section 602(a)(10) which requires that aid be furnished to "all eligible individuals." The plaintiffs contended that the maximum grant policy deprived the youngest children in a large family of any aid, but the court concluded that the result of the regulation was not to deprive anyone of benefits but to reduce the amount of benefits given to each recipient. Thus, *King v. Smith*[64] was distinguished on the basis that no "eligible individuals" were being denied benefits in *Dandridge.* The court noted:

> The appellees rely most heavily upon the statutory requirement that aid "shall be furnished with reasonable promptness to all eligible individuals.
>
> But since the statute leaves the level of benefits within the judgment of the State, this language cannot mean that the "aid" furnished must equal the total of each individual's standard of need in every family group.[65]

It was also stated that "[a]s long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated."[66]

The Supreme Court in the *Jefferson* case held that the system employed by Texas to allocate its fixed pool of welfare money

60. Alcala v. Burns, 362 F. Supp. 180, 185-86 (S.D. Iowa 1973), *aff'd,* 494 F.2d 743 (8th Cir. 1974).
61. Parks v. Harden, 354 F. Supp. 620, 623 (N.D. Ga. 1973).
62. 397 U.S. 471 (1970).
63. 406 U.S. 535 (1972). The *Parks* court also referred to Townsend v. Swank, 404 U.S. 282 (1971), and Carleson v. Remillard, 406 U.S. 598 (1972), in support of its conclusion, although the reason for their inclusion is unclear since these cases do not stand for the proposition for which they were cited.
64. 392 U.S. 309 (1968).
65. Dandridge v. Williams, 397 U.S. 471, 480 (1970).
66. *Id.* at 481.

among persons with acknowledged need did not violate the Social Security Act. Texas had reduced the standard of need for AFDC by a greater percentage than for other assistance programs. The *King* and *Townsend* cases were again distinguished, relying on the language in *King* that

> States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.[67]

The Court determined that section 602(a)(10), which requires that benefits be furnished to "all eligible individuals," was not violated by the Texas scheme. The statute was intended, the Court observed, to prevent states from denying benefits to qualified individuals and from creating certain exceptions to standards specifically enunciated in the federal Act. Section 602(a)(10) did not, however, "enact by implication a generalized federal criterion to which States must adhere in their computation of standards of need, income, and benefits.[68]

From an examination of *Dandridge* and *Jefferson*, it appears that the reliance by the *Parks* court on their holdings is misplaced. These cases did not involve the exclusion of an identifiable group of eligible individuals from the AFDC program but only the methods used by the states to allocate available state resources among AFDC recipients. In *Dandridge* and *Jefferson* it was the amount of AFDC grants which was being called into question, while in *King, Townsend* and *Carelson,* and in those cases involving AFDC for the unborn, it was the classification of persons eligible for AFDC which was at issue.

The court in *Parks* admitted that if the phrase "dependent child" in section 606(a) necessarily included the unborn child, *King, Townsend* and *Carleson* would require the rejection of state plans which omit aid for the unborn since such omissions would clearly conflict with the statute itself. Therefore, *Parks*, like the other courts which considered this issue, looked to the federal statute and its legislative history in an attempt to ascertain the Congressional intent concerning unborn children and the AFDC program. Unlike the other courts, however, the *Parks* opinion looked for the specific inclusion of the unborn in the definition of "dependent child" rather than for its specific exclusion. The court concluded: "There is no basis in the statute itself nor in the legislative history to conclude that an unborn child is included in the definition of 'dependent child.' "[69]

67. King v. Smith, 392 U.S. 309, 318-19 (1968).
68. Jefferson v. Hackney, 406 U.S. 535, 545 (1972).
69. Parks v. Harden, 354 F. Supp. 620, 625 (N.D. Ga. 1973).

The *Parks* court determined that incusion of the unborn in the payment of AFDC benefits was not required by decisions of the Supreme Court, by legislative intent, or by the administrative practices of HEW. It seems apparent that the court failed to apply correctly the eligibility test delineated in the Supreme Court trilogy.[70] Specific exclusion by Congress of a particular group, and not specific inclusion, would seem to be the proper test.

The other three courts which held AFDC payments for the unborn to be optional, but not mandatory,[71] reached results like that in the *Parks* case, using substantially similar, though not identical reasoning. Echoing the "specific inclusion" test of the *Parks* court, for example, the court in *Poole v. Endsley*[72] was unable to find any congressional intent to prescribe AFDC benefits for the unborn.[73] The court inquired rhetorically:

> Can it be said that Congress at the time that this legislation was enacted in the year 1936, intended to provide benefits in the Act for an undeveloped fetus in the early months of pregnancy? The answer is obvious.[74]

If it were indeed "obvious" that Congress in its 1936 enactment of the AFDC program had intended to exclude the unborn, then such an intent would require their continued exclusion under the Supreme Court's interpretation of the *King*, *Townsend* and *Carleson* cases. There is, however, no real evidence of such an intent and, in fact, it appears likely that the 1936 Congress gave no consideration to the unborn with respect to the AFDC program. Thus, absent an intent to exclude, under the trilogy holdings, there is no need to find an intent to include. The unborn must be held to be eligible for benefits under the program unless specifically excluded or unless the unborn child cases can be validly distinguished from the *King-Townsend-Carleson* triad.

An attempt to draw such a distinction was made in *Mixon v. Keller*.[75] According to this case, the language of the Social Security Act[76] itself appeared to exclude fetuses, because "[i]t is obviously impossible to encourage the care of a fetus in the home of a relative

70. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).
71. Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974); Mixon v. Keller, 372 F. Supp. 51 (M.D. Fla. 1974); Murrow v. Clifford, Civ. No. 114-73 (D.N.J. June 12, 1974).
72. 371 F. Supp. 1379, 1383 (N.D. Fla. 1974).
73. *Id.*
74. *Id.*
75. 372 F. Supp. 51 (M.D. Fla. 1974).
76. 42 U.S.C. § 601 (1970).

other than the mother."[77] The court noted that fetuses are, according to expert testimony, never referred to medically or clinically as "children" and further observed that "child" does not mean fetus in normal conversational usage.[78] Thus, the court concluded that

> those members of Congress responsible for the drafting and passage of this legislation were not so naive, unversed or short-sighted in medical terminology to ignore or omit the term "fetus" where it is alleged they specifically intended to include the same. Such an omission from Title IV could only be intentional when one examines Title V of the Social Security Act where Congress specifically includes mention of pre-natal care and prospective motherhood and child-bearing.[79]

Having shown to to its own satisfaction that the unborn were excluded from the terms of the Act, the *Mixon* court demonstrated that the Supreme Court trilogy[80] could be distinguished from the question involving AFDC for the unborn. These three cases, the court noted, dealt with fact situations in which a state had excluded individuals specifically included in the plain language of the Social Security Act.[81] Since in the instant case the unborn were excluded, the court reasoned that the state's action in denying the unborn AFDC benefits did not constitute the imposition of an additional eligibility requirement excluding individuals from AFDC benefits whom the Social Security Act had "expressly provided"[82] would be eligible. Therefore, the court held, the *King-Townsend-Carleson* trilogy did not require that AFDC for the unborn be a mandatory part of the AFDC program.

This logic, while it may be superficially appealing, fails upon closer examination. The *Mixon* court merely eliminated the problem by defining its terms in such a way that the phrase "dependent child" in the Social Security Act[83] was deemed to exclude the unborn. This, of course, is the crux of the matter. The central issue in all of these cases is precisely whether the unborn are considered to be dependent children. The language of the act does not clearly exclude the unborn, despite the holding to the contrary in *Mixon v. Keller*.[84] And, absent this specific exclusion by Congress, it

77. Mixon v. Keller, 372 F. Supp. 51, 54 (M.D. Fla. 1974).
78. *Id.*
79. *Id.*
80. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).
81. Mixon v. Keller, 372 F. Supp. 51, 55 (M.D. Fla. 1974).
82. *Id.* at 56.
83. 42 U.S.C. § 606(a) (1970). *See* note 53 *supra*, for the text of this section.
84. 372 F. Supp. 51 (M.D. Fla. 1974).

would appear that the Supreme Court trilogy requires mandatory AFDC payments for the unborn.

The *Mixon* court, however, rejected the specific exclusion theory, stating that "[t]his construction does violence to the actual intent expressed by the Supreme Court in the . . . [trilogy] cases."[85] Quoting from the Supreme Court's discussion of the *King-Townsend-Carleson* trilogy in *New York State Department of Social Services v. Dublino*,[86] the court observed:

> In [the trilogy] cases it was clear that state law *excluded* people from AFDC benefits whom the Social Security Act *expressly provided* would be eligible. The [Supreme] Court found no room either in the Act's language or legislative history to warrant the state's *additional* eligibility requirements.[87]

The *Mixon* court apparently believed that, unlike the terms "parent" in *King* and "continued absence from the home" in *Carleson*, the meaning of "dependent child" was unclear, that it did not necessarily include unborn children, and that therefore it should not be so construed. Since the statutory phrase did not definitely include the unborn, the court felt that Congress intended the states to have discretion in determining whether to extend AFDC to the unborn. The court concluded that it was consistent with the Supreme Court's most recent construction of the "triad" in *Dublino* to hold that, absent an express provision in the federal act including the unborn, they need not be covered by the state. However, this identical argument was unsuccessfully raised by the United States in its amicus brief in *Carleson*.[88] The Supreme Court disregarded the argument there and the *Mixon* court would have been well-advised to do the same. This line of reasoning amounts to a reversal of the trilogy test of eligibility and would authorize states to exclude persons from AFDC unless the statute or its legislative history clearly made coverage mandatory.[89]

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85. *Id.* at 55.
86. 413 U.S. 405 (1973).
87. Mixon v. Keller, 372 F. Supp. 51, 56 (M.D. Fla. 1974) (emphasis original), *citing* New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 421 (1973).
88. Brief for United States as Amicus Curiae at 5-7, Carleson v. Remillard, 406 U.S. 598 (1972). In its brief the government argued that the phrase "continued absence" in the Social Security Act did not expressly provide for the inclusion of those persons absent from the home for military service. The government reasoned that because Congress had failed to define the federal standard applicable to this aspect of AFDC eligibility the states were intended to have considerable latitude in determining what sort of parental absence justified AFDC assistance.
89. Wilson v. Weaver, 358 F. Supp. 1147, 1153 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), rejected this "reversal" of the

The *Mixon,* court argued that *Dublino* weakened the plaintiffs' reliance on the trilogy. Despite the language from *Dublino* quoted above, however, that case does not appear to be a retreat from the Supreme Court's position in *King, Townsend,* and *Carleson. Dublino* considered the Work Incentive Program ("WIN") of the Social Security Act[90], which provided that certain "employable" individuals, as a condition for receiving welfare benefits, must register for manpower services, training and employment. The WIN programs were to be established only in those states and political subdivisions

> [i]n which [the Secretary of Labor] determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established.[91]

The issue in *Dublino* was whether the WIN program pre-empted those provisions of the New York Social Welfare Law known as the New York Work Rules. While New York had implemented the WIN program in 14 of its 64 social service districts, the state had also continued to make use of its own work program under the New York Work Rules. Under the Work Rules, welfare recipients, in order to continue receiving aid, were required to meet certain conditions not imposed on them under the WIN program, for example, reporting every two weeks to pick up asssistance checks in person and filing every two weeks a certificate from the appropriate public employment office stating that no suitable employment opportunities were available.[92]

The Supreme Court found that WIN stopped short of providing adequate job and training opportunities for large numbers of AFDC recipients. Thus, the court held that the WIN program was not designed to pre-empt all supplementary state work programs whose provisions were not in actual conflict with the Social Security Act. This, however, was the extent of the court's holding. It did not, as the *Mixon* court suggested, reject the *King-Townsend-Carleson*

Supreme Court's eligibility test. The *Wilson* court, however, did not discuss the *Dublino* case.

90. 42 U.S.C. § 630 *et seq.* (1964).

91. 42 U.S.C. § 632(a) (1964).

92. N.Y. SOCIAL SERVS. LAW § 131 (McKinney Supp. 1973). Other conditions imposed included requirements that welfare recipients report for requested employment interviews, report to the public employment office the result of a referral for employment, and not fail willfully to report for suitable employment when available. N.Y. SOCIAL SERVS. LAW § 131(4) (a-d) (McKinney Supp. 1973).

test. In fact, the Supreme Court remanded the case to the district court for a determination as to which, if any, provisions of the New York Work Rules conflicted with federal law. In so doing the court reemphasized its holdings in the trilogy cases, noting: "[I]f there is a conflict of substance as to eligibility provisions, the federal law of course must control."[93]

While the *Mixon* court's interpretation of *Dublino* is not entirely without support,[94] *Green v. Stanton*[95] and *Doe v. Lukhard*[96] also considered the impact of *Dublino* on the trilogy holdings and concluded that *Dublino* had not altered the *King-Townsend-Carleson* test of eligibility. These courts reasoned that, unlike *Dublino*, the AFDC for the unborn cases do not involve questions of pre-emption.[97] Rather, they consider the exclusion of the class of unborn children from eligibility for AFDC, which constitutes a "conflict of substance" with the federal requirement that aid be furnished to "all eligible individuals." Although the Supreme Court will need to clarify the *Dublino* case before its impact can be fully determined,[98] the distinction drawn by the *Green* and *Doe* courts seems valid at present. Thus, the conclusion in *Mixon* that *Dublino* has eliminated the "specific exclusion" test appears to be incorrect.

III. RAMIFICATIONS

A. Administrative

Numerous technical difficulties remain to be resolved in those jurisdictions holding AFDC benefits for the unborn to be mandatory.

93. New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 423 n.29 (1973).
94. For a discussion of *Dublino* and its interpretation in subsequent cases, see Note, *AFDC Eligibility Conditions Unrelated to Need: The Impact of Dublino*, 49 IND. L.J. 334 (1974).
95. 364 F. Supp. 123 (N.D. Ind. 1973), *aff'd sub nom.*, Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974).
96. 363 F. Supp. 823 (E.D. Va. 1973), *aff'd*, 493 F.2d 54 (4th Cir. 1974).
97. It should be noted that the term "pre-emption" is not used in its usual sense here since the New York rules were adopted as part of the state's participation in the federal program. Ordinarily, "the pre-emption question is whether a federal statute precludes the enactment of independent state legislation dealing with the same area." Note, *AFDC Eligibility Conditions Unrelated to Need: The Impact of Dublino*, 49 IND. L.J. 334, 342 n.60 (1974).
98. The court in *Dublino* did not expressly overrule the *King, Townsend* and *Carleson* cases, and as noted, remanded the case for further proceedings consistent with the trilogy. However, the court's statement that the Social Security Act "expressly provided" for the inclusion of the classes of persons excluded from AFDC benefits in *King, Townsend* and *Carleson* is a confusing one, since this is not the interpretation previously given to these cases.

Of course, if it is determined by the Supreme Court that withholding AFDC from the unborn is contrary to the federal statute, all states will be affected. Clearly these problems can be solved through administrative regulation since some states presently provide for this sort of aid.[99]

At the purely practical level it will be necessary to ascertain in each instance that "the fact of pregnancy has been determined by medical diagnosis."[100] Presumably this determination must be made by a physician who is either employed by the state's welfare department or whose services are paid for by the welfare department, since the mothers involved are low-income individuals who would be unable to pay for their own medical expenses. This will mean increased expenditures by the welfare departments and increased "red tape" in processing certifications of pregnancy. This expense has been foreseen and provided for by an HEW regulation which states:

> Federal financial participation (at the 50 percent rate) is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the . . . pregnancy of a mother.[101]

This provision was apparently placed in the regulations for the benefit of those states choosing to grant AFDC to the unborn under the "optional" program provided for in HEW's regulations.[102]

Another minor difficulty, but one which must be considered, is the potential problem of multiple births.[103] Is the woman who is carrying twins to be allocated AFDC benefits at the level of a family consisting of one child or two?[104]

The purpose of AFDC for the unborn is to provide for the increased medical and nutritional requirements of the mother which, if

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99. *See* S. REP. No. 1230, 92d Cong., 2d Sess. 467 (1972). The court in Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973) is highly critical of HEW's failure to establish a "uniform regulatory scheme," *Id.* at 622, in this area.
100. 45 C.F.R. § 233.90(c)(2)(ii) (1973). This phrase is used in each case considered in relation to this area.
101. 45 C.F.R. § 233.90(c)(3) (1973).
102. *Id.* at (c)(2).
103. Figures on the frequency of multiple births vary. One source states that twins occur once in every 83.4 births. 15 ENCYCLOPEDIA BRITANNICA 985 (1973). Another says once in every 110. A. SCHEINFELD, TWINS AND SUPERTWINS 69 (1967). Triplets occur approximately once in every 83.4^2 (or 110^2); quadruplets once in every 83.4^3 (or 110^3); and so on.
104. It should be noted that the existence of a multiple conception can be medically determined, usually by the fifth month of pregnancy. A. SCHEINFELD, TWINS AND SUPERTWINS 37 (1967).

neglected, can adversely affect the health of the child.[105] While the mother's needs in a multiple-conception pregnancy may be somewhat greater than in a single-conception pregnancy, it is not likely that medical and nutritional requirements will be doubled in the case of twins, tripled in the case of triplets, and so on. It should be noted, however, that because of the multiple conception, there may be some increase in the mother's nutritional needs, and increased hazards to the mother's health may necessitate greater medical expenditures.[106] It may, therefore, be necessary to make some allowances for increased benefits in the case of a multiple conception, though exactly how to resolve the problem is not so obvious.[107]

Despite the fact that medical and nutritional needs do not increase proportionately in a multiple birth situation, it would appear that a state might not be able to deny equal benefits to each fetus. If AFDC payments must be made for a fetus and it can be medically proved that a woman is pregnant with more than one fetus, it seems that a state could not refuse benefits to the additional unborn. Each fetus would be required to be treated as a separate "dependent child" and thus each would constitute a distinct "eligible individual" to whom benefits could not be denied.

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105. *See* notes 15-22 *supra*.

106. It has often been noted that a multiple conception pregnancy presents greater risks to both the mother and the unborn children than one involving a single conception. *See* THE EXPECTANT MOTHER 19-20, 153-55 (M. Alk, ed. 1967); D. LLEWELLYN-JONES, M.D., EVERYWOMAN AND HER BODY 227-29 (1971); A. SCHEINFELD, TWINS AND SUPERTWINS 46-47 (1967). Apparently, the most common problem encountered in a multiple pregnancy is that of premature birth which increases the danger of infant deaths. *See* THE EXPECTANT MOTHER, *supra* at 153-55; D. LLEWELLYN-JONES, *supra* at 229. For this reason extra rest, even hospitalization, and more frequent observation by a physician are recommended in the last weeks of pregnancy for the woman in a multiple conception situation. *See* THE EXPECTANT MOTHER, *supra* at 155. One author, a gynecologist and obstetrician, notes that, if possible, a woman carrying more than one fetus should quit working by the 28th week of the pregnancy. D. LLEWELLYN-JONES, *supra* at 229. In addition to the risks of premature birth, excess fluid retention is more likely to occur in multiple pregnancies, and special medication and diet are needed to prevent this. THE EXPECTANT MOTHER, *supra* at 154-55. Further, health problems including toxemia, anemia and other complications of pregnancy are also more frequently experienced in a multiple pregnancy situation. *See* THE EXPECTANT MOTHER, *supra* at 153-55; D. LLEWELLYN-JONES, *supra* at 227-29.

107. A clearly unresponsive reply to the problem was received from an official of the California Department of Social Welfare who simply stated: "Common sense would lead one to believe that no distinction could be made between single and multiple conceptions for not even the learned medical profession can, with reasonable certainty, determine this." Letter from Michael K. Ward to P.J. Winter, January 7, 1974.

One obviously significant factor facing the states, if AFDC for the unborn becomes mandatory, is the cost of such a program. One state has estimated that the total annual cost to that state of this group's inclusion, based on a count of current infants "born into welfare" would be 2.3 million dollars.[108] The result of this inclusion would, if federal contributions are also taken into account, reduce aid to current recipients by approximately 6.8 million dollars.[109] As one court has noted, "[c]onsidering the already marginal level of welfare subsistence in the AFDC program, the effect on some current recipients would indeed be damaging."[110]

In partial response to this problem, California attempted to treat unborn children differently from "born" children, allocating for an unborn child an amount less than the full increment for an additional person in being. Under federal and state provisions, AFDC benefits may be reduced by the amount of nonexempt "income" or "resources" available to the recipient.[111] Thus, the California State Department of Social Welfare issued regulations which sought to measure the value to a fetus of the "resources" furnished to it by the mother's physical contributions. This so-called "in-kind income" was deducted from the AFDC grant received for the unborn child.

The California Supreme Court in *California Welfare Rights Organization v. Brian*,[112] held this plan to be invalid and contrary to the intent of state and federal law. A lower court had upheld the plan,[113] relying heavily on the United States Supreme Court's holding in *Jefferson v. Hackney*[114] which permitted the state of Texas to reduce the standard of need for AFDC by a greater percentage than for other categorical assistance programs under the Social Security Act. It was noted that "[a] discretion permitting dissimilar practices for the young and aged as in the *Jefferson* case is sufficiently broad to permit differential treatment of the born and the unborn."[115] While acknowledging the mandatory inclusion of the unborn, the court held that the administrator of the state welfare program possessed the discretion to recognize the mother's physical

108. Parks v. Harden, 354 F. Supp. 620, 622 (N.D. Ga. 1973).
109. *Id.*
110. *Id.*
111. 42 U.S.C. § 602(a)(7) (1964); 45 C.F.R. § 233.20(a)(3)(ii)(c) (1973); CAL. WELFARE & INST. CODE § 11450, 11008 (West 1972).
112. — Cal. 3d —, 520 P.2d 970, 113 Cal. Rptr. 154 (1974).
113. California Welfare Rights Organization v. Brian, 107 Cal. Rptr. 324 (Cal. Ct. App. 1973).
114. 406 U.S. 535 (1972).
115. California Welfare Rights Organization v. Brian, 107 Cal. Rptr. 324, 333 (Cal. Ct. App. 1973).

contributions to the unborn as a form of resources or "income in kind" and thus to increase the allowance for a family with an unborn child by an amount less than the full increment for an additional person in being.

Rejecting this rationale, the California Supreme Court noted that neither the federal nor the state provisions which permit the deduction of "income" or "resources" defined these terms. Nevertheless, the court did not believe that it was probable that the state legislature in using these terms intended them to be employed to reduce AFDC grants to unborn children. The court observed:

> In essence, the additional AFDC grant is really made to the mother, not her unborn child, for the present and future needs arising from pregnancy. Seen in this light, it would be anomalous to hold that the pregnancy generates "income" or "resources" of benefit to anyone, mother or child.[116]

In the absence of federal guidelines, state policy was deemed to be controlling, and since the applicable state statutes disclosed no intent to treat the unborn differently than other children, the court held that the "in-kind income" deductions from grants to the unborn were contrary to state and federal law. The *Brian* court did not suggest that born and unborn children must always receive equal AFDC benefits, but only that existing California statutes did not provide for any reduction of the grant to the unborn. Presumably, if it could be shown that the legitimate needs of a fetus were less than those of a born child, the state could make reduced payments to the unborn. The Supreme Court has held that "States have considerable latitude in allocating their AFDC resources,"[117] and section 602(a)(10) requires only that aid be furnished to "all eligible individuals" and not that all eligible individuals be given equal amounts.

It is interesting to note that while the California Supreme Court held that the unborn must be treated as any other "person" for the purposes of computing AFDC grants, it did so by viewing the grant itself as being made, not to the unborn child, but to the mother. This decision offers little assistance for states attempting to allocate limited resources, nor does it resolve the issue of whether the AFDC decisions will weaken *Roe v. Wade*,[118] since the court regarded the mother and not the unborn fetus as the recipient of the grant.

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116. California Welfare Rights Organization v. Brian, — Cal. 3d —, 520 P.2d 970, 974, 113 Cal. Rptr. 154, 158 (1974).
117. King v. Smith, 392 U.S. 309, 318-19 (1968). *See also* Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).
118. 410 U.S. 113 (1973).

B. The Effect on *Roe v. Wade*

It somehow seems anomalous that an unborn child can be both a "person" for the purposes of AFDC benefits and yet not a "person" within the protection of the fourteenth amendment as determined in what is commonly referred to as "the abortion decision," *Roe v. Wade*.[119] Nevertheless, only two of the courts which rendered the AFDC decisions even mentioned *Wade* in this context.[120]

In *Alcala v. Burns*,[121] the court considered the "unpersuasive but intriguing"[122] argument that the recognition of an unborn child as a "dependent child" within the meaning of the Social Security Act was in conflict with *Wade*. The court rejected the argument, noting that the issue in its case was whether Congress intended to provide AFDC benefits for a mother and her unborn child and that "[t]he fact that a child is not protected as a person under the United States Constitution is not relevant to . . . [this] inquiry."[123] The court further observed that the AFDC payments in question were made to the family, not to the unborn child itself, and that it was the mother whose right to payments was being asserted.

It is clear, however, that the reasoning of the *Alcala* court is circular. While it is true that the actual payments of AFDC benefits are made to the unborn child's family through its mother, it is equally obvious that without the existence of the unborn child no such payments would be available to the mother. The decisions requiring AFDC benefits for the unborn child must, of necessity, recognize that child as a being, as a person.

The effect of this recognition on the *Wade* opinion is not immediately apparent. In that case the right to privacy, as founded in the fourteenth amendment's concept of personal liberty and in the ninth amendment's reservation of rights to the people, was held to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[124] The Supreme Court further determined that the word "person" as used in the fourteenth amendment did not include the unborn,[125] but recognized the state's "impor-

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119. *Id.*
120. Alcala v. Burns, 362 F. Supp. 180 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974); Carver v. Hooker, 369 F. Supp. 204 (D.N.H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974). Wilson v. Weaver, 358 F. Supp. 1147 at 1154 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), makes a brief, but unhelpful, mention of abortion.
121. 362 F. Supp. 180 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).
122. *Id.* at 186.
123. *Id.*
124. Roe v. Wade, 410 U.S. 113, 153 (1973).
125. *Id.* at 158.

tant and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . in protecting the potentiality of human life."[126] The court held that the abortion decision in the first trimester of pregnancy must be left to the attending physician's medical judgment, but that state regulation in varying degrees (including proscription of abortions subsequent to viability) during the second and third trimesters of pregnancy was permissible.

Carver v. Hooker[127] approached the *Wade* decision in a somewhat different manner. The court granted standing to the plaintiffs as pregnant women, permitting them to challenge the state's denial of AFDC benefits for their unborn children because they possessed a "personal stake in the outcome of the controversy."[128] The court specifically refused to reach the question of the plaintiffs' standing to sue as representatives of their unborn children. It was then observed that because the pregnant women themselves had standing to challenge the state's practice, the case was not inconsistent with the *Wade* decision. Further, the court continued:

> [T]his would be so even if the present action does establish standing for unborn children, for even if *Roe v. Wade* holds that an unborn child is not a "person" for constitutional purposes, we deal here with a legislative enactment.[129]

The distinction drawn by the *Carver* court between the constitutional question raised in *Wade* and the interpretation of a legislative enactment made in its own case fails to confront the issue. While the court's observation is accurate, no attempt was made to delineate and resolve the competing policy considerations which present themselves in cases involving a woman's right to privacy in an abortion on one hand and AFDC benefits for the unborn on the other.

It may be that the AFDC decisions and *Roe v. Wade* will have to be allowed to stand side by side in their inconsistency. This occurrence is not altogether uncommon in the law, particularly in those areas involving the unborn.[130] It does, however, present a

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126. *Id.* at 162.
127. 369 F. Supp. 204 (D.N.H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974).
128. Carver v. Hooker, 369 F. Supp. 204, 210 (D.N.H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *citing* Baker v. Carr, 369 U.S. 186, 204 (1962).
129. Carver v. Hooker, 369 F. Supp. 204, 210 n.23 (D.N.H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *citing* Alcala v. Burns, 362 F. Supp. 180 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).
130. *See, e.g.*, Wilson v. Weaver, 358 F. Supp. 1147 at 1154 (N.D. Ill. 1973), *aff'd*, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), for a discussion of the differing treatments of unborn children for the purpose of inheritance,

dilemma which has not been adequately resolved by those courts which have rendered the AFDC decisions.

IV. RESOLUTION

It is evident that in the area of AFDC benefits for the unborn, a means of finally determining the questions presented in these cases is needed. One solution would be a Supreme Court ruling resolving the division of authority which now exists as a result of the federal circuit and district court decisions.[131] Two cases have now reached the Supreme Court,[132] and it appears likely that the court will hold that the inclusion of the unborn in the AFDC program is mandatory and not optional. The existing statute's language,[133] while not explicit, seems broad enough to include the unborn. And clearly there is no evidence of a specific congressional intent to exclude the unborn. The *King-Townsend-Carleson* test[134] would thus appear to require that AFDC be granted to the unborn.

Whatever action the Supreme Court takes in this area, Congress should clarify the language of section 606(a). The phrase "dependent child" neither clearly excludes nor includes the unborn,[135] and Congress ought to make known its intention concerning AFDC benefits for the unborn. The rejection by the Ninety-Second Congress of an amendment specifically excluding the unborn from the pro-

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federal taxation, abortion, or actions to recover for wrongful death or prenatal injuries. *See also* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).

131. Carver v. Hooker, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); Wilson v. Weaver, 42 U.S.L.W. 2634 (7th Cir. May 9, 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) and Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973); Alcala v. Burns, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973); Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823 (E.D. Va. 1973); Taylor v. Hill, No. C-74-101 (W.D.N.C. June 10, 1974); Mixon v. Keller, 372 F. Supp. (M.D. Fla. 1974); Wisdom v. Norton, 372 F. Supp. 1190 (D. Conn. 1974); Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973); Harris v. Mississippi State Dep't of Pub. Welfare, 363 F. Supp. 1293 (N.D. Miss. 1973); Murrow v. Clifford, Civ. No. 114-73 (D.N.J. June 12, 1974); Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).

132. Lukhard v. Doe, *petition for cert. filed*, 42 U.S.L.W. 3699 (U.S. May 24, 1974) (No. 73-1763); Burns v. Alcala, *petition for cert. filed*, 42 U.S.L.W. 3683 (U.S. May 15, 1974) (No. 73-1708).

133. *See* note 53 *supra*.

134. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).

135. As has been observed, "the 'plain language' of the statute is . . . not conclusive," Alcala v. Burns, 362 F. Supp. 180, 184 (S.D. Iowa 1973), *aff'd*, 494 F.2d 743 (8th Cir. 1974).

gram[136] is hardly significant because the conclusions to be drawn from the congressional failure to act are varied and unhelpful.[137]

In addition to the need for a final determination of congressional intent there exists a need for national guidelines concerning the inclusion or exclusion of the unborn in the AFDC program. The eligibility standards for AFDC are to be determined at the federal and not the state level. Thus, while the amount of individual allocations varies from state to state, the categories of individuals included as AFDC recipients must remain uniform for the entire country.

It might be argued that because of a particular state's limited resources, the inclusion of the unborn will work a hardship on current AFDC recipients if their allowances are reduced in order to provide funds for this new group of recipients.[138] If the unborn are required by the federal statute to receive AFDC benefits, however, the states have no choice but to provide them. Of course, as previously noted, the states have considerable flexibility in allocating their available resources[139] and are free to formulate reasonable standards for the allocation of their welfare funds.[140] Thus, variations in the AFDC program which take into account differing conditions among the states are possible, while national uniformity of the scope of individual eligibility for AFDC benefits is preserved.

Finally, there is a need for clarification of the AFDC decisions' effect on *Roe v. Wade*.[141] There are competing policy considerations in this context which must be resolved. The needs of welfare recipients must be balanced against the fundamental right to privacy of all women inherent in the decision to terminate a pregnancy. The *Roe v. Wade* holding need not be harmed by the cases requiring AFDC for the unborn. Simply because identical entities, in this instance the unborn child, are being considered in the two contexts does not mean that identical treatment is required. However, a logical inconsistency is raised: a pregnant woman can choose to receive increased AFDC benefits due to the existence of another being (the unborn child) or she can choose to terminate the pregnancy,

136. Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1329.
137. See the previous discussion of this situation in Part II, *supra*.
138. In fact, this contention has been made by defendants in certain of these cases. It is discussed in some detail in Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).
139. *See* Dandridge v. Williams, 397 U.S. 471 (1970); Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).
140. *See* Dandridge v. Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972).
141. 410 U.S. 113 (1973).

particularly in its earlier stages, because the unborn child does not exist as a "person" within the protection of the fourteenth amendment.

In its discussion of the abortion issue in *Roe v. Wade*, the Supreme Court may have responded, albeit indirectly, to any difficulties raised by the potential conflict between that case and the AFDC decisions. In answering the assertion that abortion should be prohibited because the fetus is a "person" from the moment of conception, the court noted:

> In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.[142]

A brief discussion of recovery in tort for prenatal injuries, of actions for wrongful death due to prenatal injuries, and of the unborn's rights in property and inheritance followed.[143] The court concluded: "the unborn have never been recognized in the law as sons in a whole sense."[144] It seems entirely likely then, that in view of the Supreme Court's attitude, the AFDC decisions need not be regarded as a legal threat to the validity of the *Roe v. Wade* decision. Instead it appears that AFDC for the unborn would constitute one of those "narrowly defined situations"[145] in which certain limited legal rights have been accorded to the unborn.[146]

V. CONCLUSION

Two of the federal court decisions concerning AFDC for the unborn are now awaiting final review before the United States Supreme Court.[147] It seems likely that the Court will determine, on

142. *Id.* at 161.
143. For a discussion of recovery in tort law for prenatal injuries, see W. PROSSER HANDBOOK OF THE LAW OF TORTS, § 55 (4th ed. 1971); 2 F. HARPER and F. JAMES, THE LAW OF TORTS § 18.3 (1956). With respect to actions for wrongful death resulting from prenatal injuries, see Annot., 15 A.L.R.3d 992 (1967). For general remarks on these and other areas of law relating to the unborn, see Note, *The Law and the Unborn Child*, 46 NOTRE DAME LAW. 349 (1971).
144. Roe v. Wade, 410 U.S. 113, 162 (1973).
145. *Id.* at 161.
146. It is also important to draw a clear distinction between the criminal nature of the abortion statutes being considered in Roe v. Wade and the civil questions involved in the AFDC decisions.
147. Lukhard v. Doe, *petition for cert. filed*, 42 U.S.L.W. 3699 (U.S. May 24, 1974) (No. 73-1763); Burns v. Alcala, *petition for cert. filed*, 42 U.S.L.W. 3683 (U.S. May 15, 1974) (No. 73-1708).

the authority of its past decisions[148] and the wording of the federal statute,[149] that AFDC benefits must be given to the unborn and that the inclusion of the unborn in state welfare programs is not optional, but mandatory. Congress may then respond to this, or a contrary, decision by clarifying the language of the statute, specifically including or excluding the unborn. This clarification would be desirable. Practical problems of administration will undoubtedly arise, but can be resolved.

One solution for eliminating the conflict between *Roe v. Wade* and the AFDC for the unborn decisions would be congressional enactment of new provisions under the Social Security Act establishing programs to assist in meeting the medical and nutritional needs of eligible pregnant women, but which would not be funded through the AFDC program. In this way, the special requirements of indigent pregnant women could be recognized and met, but the women would be receiving benefits in their own right because of a particular medical condition, and not because of the status of their fetuses as other "beings" or "dependent children."

In any event, it will be especially important that those who consider this situation not fall into what has been termed "the fallacy of the transplanted category."[150] That is, they must not assume that identical categories, in this instance the unborn, require identical treatment in dissimilar areas of the law in which different laws and policy considerations must be applied. In particular, those decisions which grant AFDC benefits to the unborn should not be used to weaken the Supreme Court's holding in *Roe v. Wade.*

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148. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).
149. *See* note 53 *supra.*
150. Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959).